Supreme Court, U.S.
FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1260

In the Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
PETITIONER

v.

BALTIMORE ORIOLES, INC., ET AL., RESPONDENTS

STEPHEN D. ROGERS, ET AL., PETITIONERS

v.

BOWIE K. KUHN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

DONALD M. FEHR
Major League Baseball Players Association
805 Third Avenue
New York, NY 10022

ANDREW L. FREY
KENNETH S. GELLER
STEPHEN M. SHAPIRO
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JAMES W. QUINN
Counsel of Record

R. BRUCE RICH
ROBIN E. SILVERMAN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

A. The Court of Appeals' Preemption Ruling Is Ripe For Review 2

B. The Preemption Question Presents An Issue Of Substantial Public Importance 3

C. The Owners Have Failed to Support The Court of Appeals' Preemption Analysis 5

1. The Finding of Preemption Cannot Properly Rest on Ownership of the Copyrights in Game Telecasts 6

2. Neither the "Work for Hire" Doctrine nor Claims About the Parties' Employment Relationship Support the Owners' Position 7

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327 (1967) 2

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 5

New Boston Television, Inc. v. *Entertainment Sports Programming Network, Inc.*, 215 U.S.P.Q. 755 (D. Mass. 1981) 8

Pittsburgh Athletic Co. v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) 8

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 5

Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) 2

Statutes:

17 U.S.C. § 301 5

28 U.S.C. § 1254 2

28 U.S.C. § 1257 2

TABLE OF AUTHORITIES—Continued

Miscellaneous:	Page
McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening To Eviscerate a Recognized State Right*, 20 Cal. W.L. Rev. 415 (1983)	6
M. Nimmer, *Nimmer on Copyright* (1986)	6
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	2
C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1978 & Supp. 1986)	2
H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976)	4

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1260

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, PETITIONER

v.

BALTIMORE ORIOLES, INC., ET AL., RESPONDENTS

STEPHEN D. ROGERS, ET AL., PETITIONERS

v.

BOWIE K. KUHN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONERS

We showed in the Petition that the court of appeals adopted an overly broad and plainly erroneous construction of the preemption provision of the Copyright Act of 1976. The Brief in Opposition reveals the weakness of the Owners' response. The Owners begin with two perfunctory reasons why the decision below does not warrant review. When they finally turn to the merits, the Owners offer a deceptive, confusing, and wholly unresponsive discussion that consists of little more than

the constant repetition of two legal arguments, one of which is demonstrably irrelevant to this case and the other of which largely begs the issue in dispute.

A. The Court of Appeals' Preemption Ruling Is Ripe For Review.

The Owners' argument (Br. in Opp. 7-8) that this case is not ripe for review reflects a misunderstanding of the relevant jurisdictional rules governing review on certiorari. It is true, as their citation to *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977), suggests, that this Court ordinarily will not review interlocutory decisions of state courts. But that is because 28 U.S.C. § 1257 requires that a state court decision represent the "[f]inal judgment[] or decree[]" in the case. There is no similar jurisdictional requirement under 28 U.S.C. § 1254, and thus "the fact that the decision below lacks finality is no bar to review of cases in the court of appeals * * *." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 at 41 (6th ed. 1986). *See also* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036 (1978 & Supp. 1986).

Moreover, even viewed from a prudential standpoint, there is absolutely no reason why the remand ordered by the court of appeals should lead this Court to deny review. This is not a case in which a lower court has remanded for further proceedings *on the issue presented by the petition.* In *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327 (1967), the case on which the Owners rely, the petitioners sought certiorari to challenge an order holding them in contempt even though the court of appeals had "remanded to the District Court to consider whether there had in fact been a contempt * * *." *Id.* at 328. Plainly, in that situation, the question presented in the petition might well have been eliminated from the case by the proceedings on remand, and it would have been inappropriate to grant review. Here, by contrast, the

court of appeals has fully disposed of the copyright preemption issue, and nothing that can or will happen on remand will affect the finality of that ruling.[1]

Thus, the Owners' "ripeness" argument is little more than a trap to prevent any further review of the court of appeals' dubious preemption decision. Although the Owners hypothesize that they might prevail on the master-servant issue on remand, they do not explain why the district court would feel the need to decide that issue, given the copyright preemption ruling; nor do they explain how, should the district court rule for the Players on the master-servant issue, it would alter the ultimate disposition of this case. *See* Pet. 9 n.9. Indeed, it is crystal clear from the Seventh Circuit's opinion that it fully expects the district court on remand merely to dismiss the master-servant count without prejudice. *See* Pet. App. 32a-33a. If the preemption issue otherwise warrants review, it seems pointless to require the Players to repeat the appellate process after these events have occurred.

B. The Preemption Question Presents An Issue Of Substantial Public Importance.

The Owners contend (Br. in Opp. 6-7) that the preemption issue raised in the Petition is of little significance because "any decision by this Court will only lead the parties back to the bargaining table" (*id.* at 6). But if the resolution of a legal issue will affect a great many economic relationships, as the preemption issue surely will, it does not matter that its impact on each such

[1] This also is not a situation where a party that can *win* its case on either of two independent grounds loses on one ground in the court of appeals and attempts to gain this Court's review while the alternative ground remains to be litigated. In that situation, the party seeking certiorari may still win the case on remand, thus mooting the controversy over the first legal issue. In the instant case, however, the Owners have merely pointed out that the party seeking certiorari might *lose* the case on remand on another ground. That speculation is not a reason to deny review.

relationship may not be dispositive but could be altered by agreement of the parties. That can be said of many important legal issues, particularly in the labor relations field.

In any event, the Owners' self-serving claim that this case is of no public importance is transparently false for a number of reasons. First, as we pointed out in the Petition (at 10-11), both Congress and numerous commentators have recognized that the preemption section of the Copyright Act is one of the most significant and fundamental aspects of the 1976 legislation. Given the weight that Congress obviously attached to this "bedrock" provision of the Act (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 129 (1976)), it is inherently implausible that the court of appeals' unprecedented construction would be of no general concern.

The Owners' assertions are further belied by the *amicus curiae* briefs filed (over the Owners' objections) in support of the Petition. These briefs, submitted by associations representing the interests of athletes in other major professional sports, as well as the range of performing artists, confirm the Players' stated concerns as to the deleterious impact that the Seventh Circuit's ruling will have on the ability of such performers to protect and exploit their valuable publicity rights. The *amicus* brief submitted by the other players' associations states that the decision below jeopardizes the ability of athletes to safeguard their "carefully-developed, long-protected, and valuable assets in their names, likenesses and performances" (Am. Br. of NFL Players Ass'n, *et al.*, 8) and concludes that the ruling's "potential for disruption of the professional lives of thousands of athletes is immense" (*id.* at 9). The *amicus* brief describing the interests of numerous performing artists likewise notes that the Seventh Circuit's reasoning "could wreak havoc in the performing arts industry" (Am. Br. of Associated Actors and Artistes 7). These representations provide a more accurate barometer of public importance

than do the Owners' unsubstantiated predictions about "collective bargaining arrangements" (Br. in Opp. 7).

Finally, the Owners' efforts to minimize the significance of the decision below fail to appreciate the federalism implications of the Seventh Circuit's broad preemption analysis. Whenever federal law is held to preempt state law, the powers of the sovereign states are thereby diminished. When the states are prohibited from legislating in areas of traditional state concern, the prohibition is particularly troubling. *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). If, as we contend, the decision below erroneously reads the Copyright Act in a manner that could impair a broad range of state statutory and common law doctrines—contract, right of privacy, publicity, etc.—then it is inconceivable that such a ruling could be of no public importance.

C. The Owners Have Failed to Support The Court of Appeals' Preemption Analysis.

The Owners' response on the merits is equally unpersuasive. The Owners do not dispute our contention (Pet. 18-19) that the decision below conflicts with every other decision or opinion to address the merits of the issue whether the 1976 Copyright Act preempts state law rights of publicity. Nor do they make any effort to contest our showing (Pet. 12-13 & nn. 10, 11) of substantial confusion in the lower courts over the approach to determining when state law causes of action are preempted by Section 301. Instead, the Owners build their defense of the decision below on two misleading and unresponsive propositions: that they own the copyrights in the videotaped telecasts of the Players' game performances (*see, e.g.*, Br. in Opp. 8, 9, 10, 11, 14); and that the scope of the employment relationship between the Players and the Owners provides the Owners with "work for hire" copyrights in the game performances, which per-

mit them to exploit those performances without limitation on any and all media (*see* Br. in Opp. 10, 12).

1. *The Finding of Preemption Cannot Properly Rest on Ownership of the Copyrights in Game Telecasts.* As noted in the Petition (at 8 n.8), this case has nothing to do with who owns the copyrights in the telecasts of Major League Baseball games. Even if the Owners own those copyrights, that fact would shed no light on whether the Players' state law rights of publicity in their game performances are preempted. The preemption issue depends upon whether the Players are asserting rights in a copyrightable "work" and, if so, whether the rights they are asserting are "equivalent" to one or more rights granted by the Copyright Act. The Brief in Opposition says precious little about those crucial issues.

As we discussed in the Petition (at 20-25), the Owners' interests in the telecasts could have a bearing on this dispute only if the Players' game performances themselves constitute copyrightable "works" that are subject to the Owners' control under the "work for hire" doctrine. But it is well settled that game performances do *not* so qualify as copyrightable works (M. Nimmer, *Nimmer on Copyright* § 1.08 [C] [2] at 1-51 & n.39 (1986)), thus rendering the Owners' thread of "reasoning" both legally erroneous and highly misleading.[2] *See also* McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening To Eviscerate a Recognized State Right*, 20 Cal. W.L. Rev. 415, 422-425 (1983).

---

[2] The Owners suggest, by selective quotation from *Nimmer on Copyright* (Br. in Opp. 11), that a state law will be preempted if it "is infringed by the mere act of reproduction, performance, distribution or display." Professor Nimmer in fact observes that where a state cause of action requires elements *additional to* any or all of these, "there is *no* preemption." *Nimmer on Copyright* § 1.01[B] at 1-12 (emphasis added). The recognition that causes of action based on publicity rights do entail additional elements has led all other courts addressing this issue to conclude that such rights are not preempted by the Copyright Act. *See* Pet. 18-19.

Moreover, as we explained in the Petition (at 23-24), the suggestion that ownership of the copyright in the audiovisual rendition of a game or other performance would control the question whether federal copyright law preempts state publicity rights proves too much. It would permit anyone who, through any means, created an audiovisual work to proclaim that, by virtue of his copyright rights in that work, he thereby defeated the state law rights of the persons whose personalities, images, and performances were captured in the work.

Obviously uncomfortable with this result, the Owners attempt to minimize the sweeping consequence of their argument by asserting that preemption would be limited to those instances in which the audiovisual work captured live performances assertedly rendered within the scope of an employment relationship. This proposition is incorrect, for the reasons stated at Pet. 24. But, as we next discuss, the Owners' supposed limitation would not help them here even if it were correct, because it both assumes a state of facts that has not been established and begs the core copyright issue—*i.e.*, whether non-copyrightable game *performances* become subject to control by virtue of ownership of a copyright in the *telecasts* of such game performances.

2. *Neither the "Work for Hire" Doctrine nor Claims About the Parties' Employment Relationship Support the Owners' Position.* The Owners repeatedly assert that the Players have been employed to produce a copyrighted work within the scope of their employment (*e.g.*, Br. in Opp. 10, 12), thereby enabling the Owners to obtain "work for hire" (or, in a phrase of their coining, "performance for hire") copyrights in the game telecasts. Concealed within this assertion is a deliberate blurring of the distinction between what the Players are employed to do (play baseball games) and what is a copyrightable "work" (an audiovisual rendition of a game). This distinction was explained at Pet. 20-23, and none

of the authorities cited by the Owners casts the least doubt on its soundness.[3]

But there are more fundamental flaws in this line of argument advanced by the Owners. Whether the Players retain state law publicity rights in their game performances almost surely depends, as a matter of state law, on whether the employment relationship over the years since televising of games began has embraced playing for television audiences.[4] Thus, if the Owners were correct in their description of the employment relationship, then any publicity rights the Players might have possessed would have been yielded to the Owners *as a matter of state law.* That, however, was *not* the rationale of the court of appeals; had the Seventh Circuit determined the state law issue favorably to the Owners, there would have been absolutely no reason for the court to discuss

---

[3] The authorities cited by the Owners in support of their position either deal not at all with copyright issues, *see, e.g., Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (involving claim of unfair competition), or merely reaffirm the irrelevant proposition that, under the 1976 Act, telecasts of sporting events are copyrightable when recorded. *See, e.g., New Boston Television, Inc.* v. *Entertainment Sports Programming Network, Inc.*, 215 U.S.P.Q. 755 (D. Mass. 1981) (use of excerpts of a copyrighted telecast does not constitute fair use). None of these cases deals with the issue whether a likeness or game performance constitutes a copyrightable work.

[4] Of course, the Players have performed in games over this period knowing that they were being televised, but that does not suffice to establish acceptance by the Players that performances for television are an inherent part of the employment relationship. What the Owners fail to point out in describing (Br. in Opp. 2) the employment relationship during the era of televised baseball is that the Players have throughout maintained that the Owners have no right to televise the games without the Players' consent and that the Owners have consistently compensated the Players for the telecasts by committing a percentage of network television revenues to the funding of the Players' pension plan. *See, e.g.*, Players' C.A. App. A137, 178 [No. 201-202]; A1034, 1036.

whether the Players' publicity rights, already extinguished under non-copyright law by the employment relationship, had been preempted by the Copyright Act.

That the fact of employment cannot control preemption may be illustrated by applying the Owners' version of the "work for hire" doctrine to a hypothetical they themselves suggest (*see* Br. in Opp. 15 n.10). Suppose Pavarotti were hired to perform Puccini arias at the Kennedy Center, perhaps to be compensated by receiving a percentage of ticket sales. Suppose further that without his consent the producers arranged to have the performance nationally telecast, for which they received a large sum that they refused to share with Pavarotti. Could the performer object to this nationwide exploitation of his name and performance, or would any state law right of publicity be preempted by the producers' copyright in the televised version of his performance?

Under the court of appeals' reasoning and the Owners' arguments in this Court, because Pavarotti was employed by the producers to perform Puccini arias, and because that performance is (under their arguments) itself a "work of authorship," the "work for hire" doctrine of copyright law would extinguish Pavarotti's right to object to the unauthorized commercial exploitation of his skills and reputation. We think that any dispassionate observer would agree that this preposterous consequence of the Owners' position simply cannot be the law —and there is no legally significant distinction between the hypothetical and the instant case.

In sum, the Owners have utterly failed to explain how their ownership of the copyrights in the game telecasts could properly extinguish any state law right of publicity the Players retain. The decision of the court of appeals unwittingly converts the Copyright Act from a protection of the rights of producers of audiovisual works against expropriation of their efforts by unauthorized third parties into a means by which employers can

unreasonably exploit their employment relationship with performers. That unsettling development warrants this Court's review.

Respectfully submitted.

Of Counsel:

DONALD M. FEHR
Major League Baseball Players Association
805 Third Avenue
New York, NY 10022

ANDREW L. FREY
KENNETH S. GELLER
STEPHEN M. SHAPIRO
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

MARCH 1987

JAMES W. QUINN
Counsel of Record

R. BRUCE RICH
ROBIN E. SILVERMAN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Petitioners